United Nations AT/DEC/1110

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1110

Case No. 1224: SHA'BAN

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 4 June 2001, Saleh Sha'ban, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 1 October 2001, the Applicant, after making the necessary corrections, again filed an Application, requesting the Tribunal to order:

a) [that he be restored] to [his] previous post as [Head Teacher] at Qastal.

b) [the Respondent to issue] a letter of regret to restore [his] dignity.

c) [to pay] $10,000 as ... compensation ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 March 2002 and once thereafter until 31 July 2002;

Whereas the Respondent filed his Answer on 25 July 2002;

Whereas on 9 June 2003, the Applicant submitted an additional communication;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 6 September 1971, as an Area staff member on a temporary indefinite appointment as a Teacher "D" Grade 06 at the Tiberias Elementary School, Wavel Camp, Lebanon. After several promotions, effective 1 September 1987, the Applicant was appointed to the post of Head Teacher, and, effective 16 September 1995, he was transferred, as Head Teacher, to Qastal Preparatory School, Baalbeck. Both schools are within the Wavel School Compound.

In October 2000, the Director of UNRWA Affairs, Lebanon, decided that a secondary class should be established in the Wavel School Compound, attached to Qastal Preparatory School. According to a Note for the Record dated 9 October 2000, in view of the added responsibilities, it was decided that the Head Teacher of Tiberias School would be better suited to assume the position of Head Teacher of Qastal School. As a result, the Applicant was transferred to the position of Head Teacher, Tiberias School on the same day.

On 13 October 2000, the Applicant wrote to the Director, UNRWA Affairs, Lebanon, requesting administrative review of the decision to transfer him from Qastal School to Tiberias School. On 19 October, the Deputy Director, UNRWA Affairs, and Field Administration Officer, Lebanon, responded to the Applicant, assuring him that his transfer was not a reflection on his performance but was done in the interest of the Education Programme and therefore the Applicant's grade and salary would not be affected.

On 10 November 2000, the Applicant lodged an appeal with the Area Staff Joint Appeals Board (JAB). The JAB adopted its report on 18 February 2001. Its evaluation and judgement, and recommendation read, in part, as follows:

"*III. EVALUATION AND JUDGMENT*

...

c) The decision to transfer a staff member from one position to another is considered in the interest of the Agency. As for the Appellant's case it was a cross-transfer and the Appellant remained a Head Teacher and suffered no loss in pay.

d) In this context, the Board by majority vote could not establish that the Administration's decision appealed against had been motivated by prejudice against the Appellant and resolved that the Administration has acted within the framework of standing rules.

IV. RECOMMENDATION

... the Board by majority vote makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed.

DISSENTING OPINION ... :

I disagree with the other board members in that the transfer of the Appellant is a disciplinary measure.

...

RECOMMENDATION

I recommend that the Appeal be reviewed."

On 29 March 2001, the Commissioner-General, UNRWA, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

I have studied the Board's report and agree with the findings of the majority of the Board, as well as with its conclusion that the Administration acted in accordance with Staff Regulations and Rules and without prejudice.

The dissenting Board member appears to be of the opinion that your transfer was a disciplinary measure. This is incorrect. The cross-transfer was a staffing decision which was based on the consideration that the Head Teacher at Tiberias Elementary Boys' School would be more suitable for the position of Head Teacher at Qastal Preparatory School once the secondary class was added to Qastal Preparatory School.

Accordingly, I have accepted the Board's recommendation that the Administration's decision appealed against should be upheld and have dismissed the appeal."

On 1 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent used the wrong criteria to determine the suitability to the post: the Applicant was the more experienced, having served in the post for 16 years, and having improved the levels of success in the Brevet Official Exams.

2. The Applicant was denied due process, particularly in that he was not shown various Notes for the Record containing adverse material relating to him.

3. Although the Applicant's salary and grade were not effected, the transfer to a lower school is a "morale demotion", especially since the two schools are within the same compound.

Whereas the Respondent's principal contentions are:

1. The Applicant's transfer from Qastal School to Tiberias School was within the authority of the Commissioner-General, in accordance with area staff regulation 1.2.

2. The Respondent's decision was an exercise of managerial discretion, based on the relative merits of the two Head Teachers, and was made in the interest of the Agency.

3. The Applicant failed to show that the decision was motivated by bias, prejudice or any improper motive, or that the decision was procedurally defective.

The Tribunal, having deliberated from 2 to 21 July 2003, now pronounces the following Judgement:

I. Prior to 16 September 1995, the Applicant had, for about six years, been Head Teacher at the Tiberias Elementary School, Wavel Camp, situated in the Wavel School Compound in Lebanon. On that date, he was transferred to the post of Head Teacher at Qastal Preparatory School, Baalbeck, which was also situated within the said School Compound. The Applicant served in that capacity, with success and distinction, until October 2000, when he was transferred back to the Tiberias Elementary School as Head Teacher, which position he had held some five years earlier.

II. In October 2000, the Director, UNRWA Affairs, Lebanon, decided that a Secondary School Class should be established within the Wavel School Compound. After consultation with the Department of Education, it was decided that it would be most appropriate to have the new class attached to Qastal School rather than to the Tiberias Elementary School.

The Deputy Chief, Field Education Programme, met with the Acting Area Education Officer, Beqa'a Area, on 9 October 2000, and, having reviewed the two Head Teachers' personnel files, they concluded that Mr. G. S., the Head Teacher of Tiberias School, was better suited for the position of Head Teacher at Qastal School, in preference to the

Applicant. Accordingly, on the same date, the two Head Teachers were switched to their new positions.

III. Area staff rule 1.2 provides that "staff members are subject to the authority of the Commissioner-General and to assignment by him to any of the activities or offices of the Agency in or outside the area of its operations."

The Applicant considers that the transfer from the post of Head Teacher Qastal School to Head Teacher of Tiberias School was in effect a downgrading (albeit that he suffered no alteration in his grade or salary) and a transfer to a less prestigious post. He claims that, as a result, his morale, reputation and career development have been detrimentally affected. The Applicant has not contested the right of management to make such a transfer per se but claims that it should be annulled and that he should be reinstated as Head Teacher at Qastal School, as he contends the criteria on which the decision was made were erroneous or inappropriate. He further contends that he should have been appraised as to what matters and documents were being considered in the selection process and that he should have been afforded an opportunity of being heard in relation thereto. The Applicant also takes issue with some of the conclusions drawn by the Administration as to why they preferred Mr. G.S. to him, claiming that these conclusions were unreasonable and that on any objective and fair assessment, the Administration ought to have concluded that the Applicant was the best suited for the post.

Whilst Staff Regulation 1.2 vests within the Administration a wide discretion in relation to appointments and to the allocation of positions and responsibilities, the Respondent freely admits that such power must not be exercised improperly or abused. With respect to whether a discretionary decision, such as the one contested in these proceedings, had been tainted, the Tribunal has held that, where abuse or prejudice is claimed, "the burden of proving prejudice or other improper motivation rests with the Applicant." (See Judgement No. 1049, *Handling* (2002) citing Judgments No. 613, *Besosa* (1993) and No. 93 *Cooperman*, (1965)) and that "the burden is on the Applicant to present convincing evidence when alleging that the decision ... is tainted by prejudice or improper motivation". (See Judgement No. 874, *Abbas* (1998); also Judgments No. 834, *Kumar* (1997) and No. 553, *Abrah* (1992).)

IV. The Tribunal has carefully examined the record. Whilst the Applicant is correct in saying that he enjoyed much more experience than Mr. G. S., both as a

teacher and a Head Teacher, and that the examination results of the pupils in Qastal School had improved substantially during the period of the Applicant's stewardship, the Tribunal is keen to stress that discretionary decisions, such as the one now under review in these proceedings, are not made by the application of sterile formulae nor are they a mechanical or mathematical process. The discretion to be exercised is the discretion of the Respondent or those to whom he delegates same, and not that of a JAB, the Tribunal or other such body as may be asked to review the decision made. On such a review, the review body would review the contested decision and ask: was it reached on reasonable and rational grounds; was it within the scope of the authority of the person or the body which made it; and, was it fair and free from prejudice. In Judgement No. 1088, *Khader* (2003) the Tribunal stated the following:

> "III. The primary purpose and objective of an Administrative Tribunal in reviewing the propriety and efficacy of a challenged administrative decision, is to determine if it was supported by adequate credible evidence and establish that it was made *intra vires* and in accordance with such Rules or Regulations as might apply and that the due process rights of the challenger (the person who has been affected by that decision) and his rights to fair procedures were vindicated in relation to the entire process. This brief description is not intended to be appropriate to all cases or to be exhaustive. In effecting the discharge of its said function, the Tribunal asks itself 'was the decision maker entitled to make the decision under review, was he entitled to accept the evidence relied upon to support it, was he within his powers to make it and was it fair and just, in all of the circumstances?' It is not for the Tribunal to ordinarily embark upon fact finding *de novo* or to seek to substitute its subjective view of the facts in place of the view taken by the decision maker when it finds that the decision-making was *bona fide* and was made on adequate acceptable evidence."

V. It seems clear to the Tribunal that those charged with making the contested decision in these proceedings were not deciding that the Applicant was somehow unsuited for the post as Head Teacher, Qastal School, with its added dimension and responsibilities. Nor were they reflecting adversely on the Applicant's past performance as the Head Teacher of that school. They merely decided that, as between the two candidates, Mr. G.S. was more suitable for the post of Head Teacher of Qastal School after the secondary class was added. This was a decision for them, and for them alone, which should not be interfered with by any review body such as the JAB or this Tribunal, unless satisfied that it was perverse, irrational, prejudiced or based on some improper consideration; or unless otherwise satisfied that there was a clearly identifiable reason, based on cogent evidence, that required, in the interests of justice, that it be annulled. The Tribunal, like the majority of the JAB, can find that no such infirmity has been established by the Applicant.

VI. The Tribunal rejects the view expressed by the dissenting member of the JAB, who considered that the contested decision was unjustified and therefore tantamount to a disciplinary measure against the Applicant. It appears to the Tribunal that the dissenting member fell into error, in that he sought to exercise his own subjective judgment as to which of the two candidates was to be preferred, rather than identifying any fatal shortcomings as to the *manner* in which the decision had been reached by the Administration.

VII. Finally, the Tribunal is satisfied that the Applicant had been adequately and sufficiently acquainted with such personality or temperamental shortcomings or complaints as had been alleged against him and as might have been considered potentially influential, so that it must reject the Applicant's submission that he was treated unfairly by not being afforded a reasonable opportunity of responding to those matters.

VIII. Accordingly, the Tribunal finds that the decision to transfer the Applicant as Head Teacher to Tiberias Elementary School was a valid exercise of the Administration's discretion, that it was not made unreasonably or unfairly or influenced by bias or prejudice or any improper or extraneous consideration.

IX. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

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